Supreme Court, U.S.
FILED
MAY 27 2010
OFFICE OF THE CLERK

No. 09-1258

IN THE
Supreme Court of the United States

LONG BEACH MORTGAGE COMPANY,

Petitioner,

v.

ROBB EVANS
AS RECEIVER FOR TLC AMERICA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FIFTH DISTRICT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

This case is about whether a federal receiver may file suit in the receivership proceeding where he was appointed to establish a real property interest in non-receivership property located outside the State where he was appointed, assuming proper compliance 28 U.S.C. § 754 or whether the receiver must file the suit in the State where the property is located under this Court's Local Action Doctrine adopted in *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 107 S.Ct. 771, 39 L. Ed. 913 (1895).

The judgment below from the California federal court where Respondent established his interest in Texas real property was void because neither Respondent nor the federal court that adjudicated his constructive trust claim interest had subject matter jurisdiction over the real property in question. Respondent failed to timely re-file his permanent appointment documents in Texas where the property was located under 28 U.S.C. § 754. But even if Respondent had timely filed his reappointment papers and secured jurisdiction properly, his constructive trust claim as filed (App A – Excerpt of Respondent's California complaint) would have failed in Texas because Texas law expressly forbids the use of a lis pendens in a constructive trust cause of action where diverted funds are the basis of the claim. *Flores v. Haberman*, 915 S.W. 2d 477, 478 (Tex. 1995) The *Flores* decision holds that the constructive trust claim based on converted funds used to acquire real property is deemed a collateral

interest into the real property and not a valid title dispute between Petitioner and Respondent. *Flores v. Haberman,* 915 S.W. 2d 477, 478 (Tex. 1995)

Texas has a formal procedure to determine title to real property called "Trespass to Try Title." TEX. PROP. CODE § 22.001 (Vernon 2004) The litigation process has its own special rules of civil procedure. (App B - TEX. R. CIV. P. 783- 809) Respondent alleged no such complaint to establish his interest in the Marquette Property in his federal complaint. (App A). The absence of the Texas trespass to try title cause of action being pled in the California litigation means that Respondent's constructive trust claim was never litigated in the California court. (App. A)

To the extent that the California judgment determined that Respondent had a valid title interest in the Marquette Property for the Respondent, the judgment should be declared void and not entitled to Full, Faith and Credit. U.S. CONST. art. IV, § 1. The manner in which it was ultimately obtained and enforced offended traditional notions of fair play and substantial justice. This Court should reverse the Fifth Court of Appeals at Dallas, Texas and declare that the California judgment is void insofar as adjudicating Respondent's constructive trust claim having priority over Petitioner's lien claim in the Marquette Property. This Court should hold that Petitioner's claim to the Marquette Property has priority to that of Respondent under the *Flores* decision. Further, the Court should enforce its Local Action Doctrine in *Ellenwood* in cases involving title disputes where the district courts otherwise have in rem jurisdiction over the real property under 28 U.S.C. § 754 or decide

whether Congress intended to federalize all such litigation in the receivership proceedings outside the state where the property was located.

RESPONDENT'S JURISDICTION OVER THE MARQUETTE PROPERTY EXPIRED AND WAS NOT TIMELY RENEWED WHEN HE WAS PERMANENTLY APPOINTED UNDER 28 U.S.C. § 754

While it has been held that 28 U.S.C. § 754 permits a receiver to obtain *in rem* jurisdiction over receivership property located in other federal districts, *Stenger v. World Harvest Church, Inc.*, 2003 U.S. Dist. LEXIS 15108 (N.D. Ill. 2003), Congress requires that to do so a receiver must timely file their appointment documents in the federal district where the property is located within ten days after the entry of their appointment. *United States SBA v. Herbst*, 2009 U.S. Dist. LEXIS 40993 (N.J. 2009) (ten-day requirement satisfied). If they fail to timely file such documents in the federal district where property is located the federal courts addressing the question have held that a new or renewed appointment restarts the 10-day clock under Section 754. *Securities & Exchange Comm'n v Khanna*, 2010 U.S. Dist. LEXIS 42775 (S.D. CA 2010) (order of re-appointment restarts 10-day deadline under 28 U.S.C. § 754).

Respondent glosses over the requirement of compliance with the key dates as required by Section 754. It is undisputed that under the California Local Rules, Respondents temporary appointment expired on October 31, 2000. Respondent's argument that his

temporary appointment on October 4, 2000, never expired is also contrary to California Local Rule 66-2 in effect in 2000 that states:

> A temporary receiver shall not be appointed for a period longer than the next Motion Day following the expiration of twenty (20) days after the date of appointment.

LOCAL RULE CIV P. 66-2, CALIF. CENTR. DIST.

Upon Respondent's reappointment on November 1, 2000. Respondent failed to timely file his reappointment papers within ten-days after that date in the Northern District of Texas where the Marquette Property was located. Thus, Respondent's claim that the initial temporary appointment as receiver never lapsed is contrary to the law of the circuit in which he was appointed, *Id.*, and of other circuits addressing the question that the 10-day period starts from the permanent appointment, not the temporary appointment. *Sec. Exch. Comm'n v. American Capital Investments, Inc.*, 98 F. 3d 1133 (9th Cir. 1996); *Sec. Exch. Comm'n v. Vision Communications, Inc.*, 74 F. 3d 287, 291 (D.C. 1996). Congress did not legislate that Section 754 be a procedural rule that can be waived such as a deadline to file a non-dischargeability complaint as in *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) cited by Respondent.

The issue was whether the failure to comply with Section 754, a federal statute, resulted in the Respondent and the federal court losing subject matter jurisdiction in the absence of a reappointment and a

timely filing of his reappointment papers and complaint in the Northern District of Texas.

Section 754 is simple and clear. If the complaint and order of appointment is not filed in the district court where the property is located then the failure to file such copies "shall divest the receiver of jurisdiction and control over all such property in that district." Petitioner's reading is not "ultra-technical." (See Respondent's Brief in Opposition, p. 21). In construing a phrase in order to resolve differences in the Circuits, the primary weight is upon the need for judicial administration to remain as simple as possible. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 175 L.Ed. 2d 1029 (2010). Respondent was divested of jurisdiction over the Marquette property when he filed his reappointment papers untimely in the Northern District of Texas when they were filed on January 2, 2001, more than 10-days after his permanent appointment. Respondent admits to a late filing on page 8 of his Brief in Opposition.

ASSUMING RESPONDENT ACQUIRED JURISDICTION OVER THE MARQUETTE PROPERTY, TEXAS LAW PROHIBITS A LIS PENDENS IN A CONSTRUCTIVE TRUST SUIT BASED ON CONVERTED FUNDS

Respondent learned of the Marquette Property in July 2002 and:

> ". . . [i]mmediately upon discovering the Marquette Property, the Receiver filed a Notice of Lis Pendens providing Notice of his

> interest and rights in the Marquette Property. The Receiver filed the Notice of Lis Pendens on July 23, 2002. . ."

(Respondent's Brief in Opposition, p. 9 – 10).

Respondent also admits that in the California litigation that:

> The Receiver asserted claims of fraud, conversion, negligence and breach of fiduciary duty. The Receiver also sought the imposition of a constructive trust on property purchased with funds stolen from TLC America.

(Respondent's Brief in Opposition, p. 8); (App. A)

In Texas, a lis pendens cannot be filed to enforce a constructive trust claim based on converted funds. *Flores v. Haberman*, 915 S.W. 2d 477, 478 (Tex. 1995) In *Flores* the Court held that the creation of a constructive trust into real property acquired by converted funds is a collateral interest in real property and not a title dispute for which a lis pendens is proper. A lis pendens is improper in that case because it serves to trap the real property during the litigation in order to satisfy a judgment and is a remedy for a constructive trust claim. The *Flores* rule prohibiting the use of a lis pendens in cases involving the conversion of money was criticized in a 2008 law review article by Professor Florrie Young Roberts at Seton Hall:

> Nevertheless, some courts have expunged lis pendens in actions for a constructive trust where tracing of funds is involved or where

> plaintiffs have also sought damages. These courts have concluded that the constructive trust claims are filed "as a collateral means to collect money damages" or primarily for the purpose of securing money damages, and therefore, are not real property claims required by the lis pendens statutes.
>
> These courts ignore the clear language of the statutes authorizing the recordation of a lis pendens in actions involving real property. Additionally, the statutory safeguards that already exist are sufficient to prevent abuse of the lis pendens process.

See Roberts, *The Propriety of a Lis Pendens in Constructive Trust Cases*, 38 Seton Hall L. Rev. 213, 251 (2008.) Despite the criticism, *Flores* is settled law in Texas.

The *Long Beach* decision below is now contrary to the *Flores* decision. That the Texas Supreme Court decided to leave the decision of the Dallas Court of Appeals alone shows that great deference is being given to the federal court judgment in California that established jurisdiction over the Marquette Property: "[M]oreover, the California federal court continued its jurisdiction over the case to resolution." *Long Beach Mortg. Co.*, 284 S.W.3d at 411.

Federal receivers may now file a Texas constructive trust claim in the federal court where they are appointed and may enforce those claims against Texas property based on the *Long Beach* case. This is a remarkable federalized exception to the *Flores* decision. The Court should not allow the California final judgment to be

entitled to Full, Faith and Credit because of the confusion this case will cause to Texas law and the law of other states. Respondent still has a constructive claim in the Marquette Property; but under *Flores,* Section 12.007 of the Texas Property Code, is not a mechanism to trap the real property during the course of the administration of the receivership or to permit the receiver to have priority over others with an interest in the property.

28 U.S.C. § 754 could have clearly provided that title disputes be tried in the receivership proceedings rather than in the states where the property is located. Therefore it is not proper to read into the statute that the Local Action Doctrine was abandoned by reason of it. Respondent's fears that if federal receivers are forced to litigate title disputes in the district where the real property is located would result in receivers having to "hopscotch across the country creating utter chaos" is misplaced. (Respondent's Brief In Opposition, p.34) Neither party can cite to another case quite like this where the federal receiver filed a lis pendens in the county of the state where the real property was located presumably to give "constructive notice" to the world of the litigation and then proceeded to litigate the federal receiver's "constructive trust" claim against only one property owner (that was legitimately before the federal court) and completely omitting the other property owners and/or lien claimants.

The Local Action Doctrine is not only sound but is the most rational doctrine for establishing the location for real property disputes to be tried. Had Respondent simply followed the rule this would have resulted in one lawsuit against all property owners and Petitioner, rather than four successive lawsuits, causing perhaps a

staggering sum of litigation costs to the TLC America receivership proceeding in order to achieve the ultimately irrational judgment that was eventually obtained below.

THE CALIFORNIA FEDERAL COURT JUDGMENT OFFENDS TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE

Respondent's judgment in California should not have been entitled to Full, Faith and Credit. U.S. CONST. art. IV, § 1. The underlying premise on which it was obtained and applied to Petitioner violates traditional notions of fair play and substantial justice. This Court's holdings in *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L. Ed 95 (1945) and *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed 2d 683 (1977) require fair notice of litigation through minimum contacts in the foreign state in *in rem* and *quasi in rem* litigation. Fair warning applies to defendants who purposefully avail themselves in the forum states. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed 2d 528 (1985). Petitioner was never a party to the California litigation.

Under Texas law, the court may cancel a lis pendens upon motion by a "person interested in the result of or in property affected by a proceeding in which a lis pendens has been recorded" if the court can determine that the party seeking affirmative relief can be adequately protected. TEX. PROP. CODE § 12.008 (Vernon 2004) Petitioner's ability to cancel the lis pendens could have been accomplished only by appearing in the California federal court (where it was not made a party to the lawsuit). The California judgment offends *Int'l Shoe* and *Shaffer* because Petitioner never

availed itself in California and should not have been left with the option to having to intervene in the California litigation in order to test the validity of Respondent's lis pendens under Section 12.008 of the Texas Property Code based on the *Flores* decision.

Applying the constructive trust claim as established by the lis pendens filing was unfair to Petitioner. Petitioner's loan was made and closed in Texas. Under Texas law, Respondent's lis pendens was void because it violated the *Flores* decision. Texas law provides that the recording of instruments which are not permitted by law is not notice. *Burnham v. Chandler*, 15 Tex. 441, 443 (1855) ("[A]s the registration law does not require or authorize the instrument of assignment referred to in this case to be recorded, the record would not be notice of the existence of such instrument."); *Countrywide Home Loans v. Howard*, 240 S.W.3d 1 (Tex. App. – Austin 2007, pet. denied) Petitioner's notice of the California litigation was based on a void lis pendens that violated Section 12.007 of the Texas Property Code, the *Flores* decision, and was filed in the real property records on the same that its loan closed.

Respondent alleged that subject matter jurisdiction in the suit was based on federal question jurisdiction under 28 U.S.C. § 1331. (App. A – Respondent's Amended Complaint) Respondent claims that his constructive trust claim is based on "fraud, conversion, negligence and breach of fiduciary duty." (Respondent's Brief in Opposition, p. 8) Federal question jurisdiction rests on claims that arise under the Constitution, laws or treatises of the United States. Respondent's lis pendens filing in Dallas County, Texas references that

"[t]he action seeks to establish an interest or a right in real property situation in Dallas County, Texas . . ." (Respondent's App. 16) Respondent does not state whether any of its common law claims were based on Texas or California law.

Respondent's other ground for jurisdiction was on the basis of 28 U.S.C. § 754. (App. A) As argued above, Respondent's jurisdiction over the Marquette Property expired.

It is undisputed that Respondent did not know of the Marquette Property at the time he filed his January 2002 amended complaint and that he did not file a supplemental complaint identifying the Marquette Property or his claim to it. The amended complaint did not describe the Marquette Property nor the basis for the conversion of funds into the real property and whether that basis was on Texas law or California law. (App. A.) No doubt that the federal court would have granted leave to amend to allege a new claim against the Marquette Property. F. R. CIV. P. 15(a) (leave of court is freely given).

This Court recognizes that the state where the land is located is the "sole mistress" of its rules of real property. *Williams v. North Carolina*, 317 U.S. 287; 63 S. Ct. 207; 87 L. Ed. 279 (1942); *Yarborough v. Yarborough*, 290 U.S. 202, 54 S. Ct. 181, 78 L. Ed 269 (1933); *Hood v. McGehee*, 237 U.S. 611; 35 S. Ct. 718 (1915). *See also, Sleeping Child LLC v. Lewis and Clark Capital LLC et al*, 2008 Mont. Dist. LEXIS 492 (2009) (state district court found that Montana had specific jurisdiction over the real property dispute and that

leave of the federal court to file the action was not required when the federal receiver filed a document that affected the title in that state.)

CONCLUSION

This Court should grant petition for writ of certiorari and hold that the judgment in California to the extent that it adjudicated title should be declared void, that the Texas courts erred in extending Full Faith and Credit to it. The Court should reaffirm its Local Action Doctrine with regard to proceedings filed by federal receivers under 28 U.S.C. § 754. For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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